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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA, DEFENDANTS

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

E. B. EVANS, *Attorney for Defendants.*
H. C. EVANS, of *Counsel.*

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

Number 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN AND PALO ALTO COUNTY, IOWA, DEFENDANTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

To George E. Clark, Attorney for George Schlosser, Plaintiff in error, Algona, Iowa:

Sir:—You will please take notice that the defendants in error, W. L. Hemphill, Richard T. Ryan and Palo Alto County, will, on Monday, October 10th, 1904, at the opening of Court on said day, or as soon thereafter as counsel can be heard, move the Supreme Court of the United States at the court room of said Supreme Court at the Capitol in the city of Washington, D. C., to dismiss the writ of error to the supreme court of Iowa heretofore on or about the ..... day of December A. D. 1903, sued out of the said Supreme Court of the United States by said plaintiff in error above named and for such other and further relief as to the court may seem just.

You will further take notice that said motion will be based upon the ground that said Supreme Court of the United States has no jurisdiction of said cause above entitled for the reason:—

First: That this cause does not involve a federal question; that is to say, there has not been drawn in question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any state on the ground that such statute is repugnant to the constitution, treaty or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

Second: If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa, there was also pending before said Supreme Court of Iowa in this cause another question not federal which was also raised in said cause and decided by said Supreme Court of Iowa against the plaintiff in error and the decision of the latter question was sufficient, notwithstanding the federal question (if any) to sustain the decision of the Supreme Court of Iowa irrespective of what its decision (if any) may have been upon such federal question (if any.)

Further take notice that at the same time and place said defendants in error will move said Supreme Court of the United States for such other and further order or relief as the defendants in error may be in equity and in good conscience entitled to, and as to the said Supreme Court of the United States may seem just.

Further take notice, that said motion will be made upon all the records, files, and papers of said cause above entitled, on file

in said Supreme Court of the United States, which will be referred to in support thereof.

E. B. EVANS,
Attorney for Defendants in Error.
H. C. EVANS AND EVANS & EVANS, *of Counsel.*

Service of the foregoing notice and of the following motion and brief acknowledged and accepted and a copy of each thereof received on this ..... day of August A. D. 1904.

Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

Number 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN AND PALO ALTO COUNTY, IOWA, DEFENDANTS IN ERROR.

MOTION TO DISMISS.

Comes now W. L. Hemphill, Richard T. Ryan and Palo Alto County, through their undersigned counsel and move the court to dismiss the writ of error to the Supreme Court of Iowa heretofore, to-wit:—on or about the ..... day of December A. D. 1903, sued out in this cause and for such other and further order or relief as to the Court may seem just and in support of this motion assigns the following

SPECIFICATIONS FOR GROUNDS OF MOTION.

The motion to dismiss the writ of error made above is based upon the ground that this court has no jurisdiction to review the judgment of the Supreme Court of Iowa heretofore rendered in this cause, for the reasons:—

First: That this cause does not involve a federal question; that is to say, there has not been drawn in the question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any state on the ground that such statute is repugnant to the constitution, treaty or laws of the United States, the decision wdereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under, the constitution or any treaty or statute of, or commission held, or authority exercised, under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

Second: If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa there was also pending before said Supreme Court of Iowa in this cause another question not federal which was also raised in said cause and decided by said Supreme Court of Iowa against the plaintiff in error and the decision of the latter question was sufficient, notwithstanding the federal question (if any) to sustain the decision of the Supreme Court of Iowa irrespective of what its decision (if any) may have been upon such federal question (if any).

STATEMENT OF CASE.

To enable this Court to pass upon and determine and decide the foregoing motion the case will be sufficiently stated by setting out from the transcript, the pleadings, and the decision of the District Court of Palo Alto County, Iowa, and of the Supreme Court of the State of Iowa, and the assignment of errors made in this Court by the plaintiff in error, all of which are as follows:—

The plaintiff in error being the plaintiff in the District Court of Palo Alto County and the Supreme Court of the State of Iowa, on the 13th day of January, 1900, filed in the District Court of Palo Alto County, Iowa, the following

PETITION.

That the plaintiff is the absolute owner in fee simple of lots 2 and 3 in section 30, T. 97, R. 34, that the said lots were surveyed by the government and platted and the record of said survey and plats were duly returned to the General Land Office at Washington, D. C., and became a part of the records of said office; that said lots were meandered by the Government surveyor, and said meander lines run with reference to a lake then existing in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation between said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by mean conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake; about 1899 the defendant without the consent of the plaintiff entered into possession of all the land between the meander line and the lake proper and are now claiming title to said land, which claim is adverse to title of plaintiff.

That the plaintiff's title includes all of the land embodied in the south half of said section and his title is complete to all of said land claimed adversely by the defendants. Plaintiff further states that the defendants other than Palo Alto County are engaged in committing waste on said real estate by cutting and

carrying away the timber thereon; that the said defendants are insolvent; wherefore the plaintiff prays that the fee simple title to all of the real estate described be established and quieted in plaintiff; that the defendants and each of them be forever barred and estopped from having any title or interest in said real estate adverse to the plaintiff and that the defendants be enjoined from cutting and clearing away any of the timber standing thereon; that in the event the court should determine the plaintiff is not the owner of all the land included in the south half of said section that the court then determine the extent of the boundary of the plaintiff's land and that the court decree the plaintiff is the fee simple owner to all the land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line and the south line of section 30 and that title be quieted in the plaintiff and the defendants barred from having any interest or title in said real estate adverse to this plaintiff, and defendants be enjoined from cutting and removing timber thereon, and such other relief as may seem equitable and a writ issue removing the defendants from said premises and placing plaintiff in possession.

On the 4th day of March, 1900, the defendant in error, Richard Ryan, filed in the District Court of Palo Alto County the following

ANSWER.

This defendant denies each and every allegation in plaintiff's petition not hereinafter specifically admitted; as to whether the Government issued patents to lots 2 and 3 and the plaintiff is the owner of said land the defendant asks the court to require strict proof; as to whether said lots were surveyed and platted by the Government and said survey and plats filed in the General Land Office, and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief,

and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, T. 97, R. 34. Defendant states that lots 2 and 3 of said section contains 99.80 acres, as shown by the Government survey and plats of said lots; that the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the Government survey and plats, and that neither said patent nor deeds purport in any manner to convey the land embraced in lots 12 and 13, being a part of the land in controversy, and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13. Defendant states that on the 8th day of March, 1898, the Secretary of the Interior directed the Commissioner of the General Land Office to cause to be surveyed certain unsurveyed land in sections 19-20-29 and 30, T. 97, range 34, and sections 25, 36, T. 97, R. 35; that the Commisioner of the General Land Office caused the unsurveyed land in said sections to be surveyed; that said survey was made on the 2nd to the 20th days of April, inclusive, of the year 1898; that there was surveyed by said Government surveyor 1230 acres of land in the aforesaid sections; that the plat of said survey and the subdivisions of said 1230 acres of land, together with field notes, were duly made by said surveyor and filed in the General Land Office at Washington, D. C., in accordance with law; the land so surveyed became subject to disposal under the laws of the United States for the disposal of public land; under direction of the Secretary of the Interior the register and receiver of the United States land office at Des Moines, Iowa, published notice as required by law that said 1230 acres of land would be open to entry on the 30th day of August, 1898; that prior to the 30th day of August, 1898, defendant had established his residence upon lots 12 and 13 of said section; on the 30th day of August,

1898, he filed his written application to enter the land embraced in said lots as a homestead, together with the evidence required by law showing his qualification to make homestead entry of Government land; that his application was approved and the defendant paid the required fees and commission to the receiver of said land office; his entry was allowed and became of record, and that said entry is now of record and in full force and effect, and the defendant is now engaged in living upon, cultivating and improving the land embraced in his homestead entry, being a part of the land plaintiff seeks in his petition to have title decreed in plaintiff. Defendant states that the land embraced in his homestead entry is adjacent to and attached to and is in the same condition as the land involved in the case of Grant vs. Hemphill decided by the Supreme Court of the State of Iowa on the 26th day of May, 1894 (92 Iowa, 218), wherein it was held that "all the land in dispute is a part of the unsurveyed domain of the United States to which any one can not obtain title except through the regular Government method adopted by the General Government for the disposal of public lands." The defendant states that this court has no jurisdiction over the subject matter of this suit; that is over lots 12 and 13 of said section for the reason that the legal title to the land embraced in said lots is in the Government of the United States, subject to the rights of this defendant to finish and complete his residence and cultivation of said lots, as required by the law.

Defendant attaches hereto copy of his homestead application marked Exhibit "A," copies of his affidavit attached to said application marked Exhibits "B" and "C," copy of homestead receipt marked Exhibit " D," copy of homestead entry book and of tract book of the Government Land Office marked Exhibits "E" and "F," all of which are made a part of his answer.

Defendant states that on the 30th day of August, 1898, the plaintiff George Schlosser, recogniing the validity of the sur-

vey made in the year 1898, as herein set forth, filed application to enter lots 13 and 14 of said section, being a part of the land in controversy, as an adjoining farm homestead; that his application was rejected by the register and receiver, notice of which was served on plaintiff; that thereupon said Schlosser filed in said land office a contest against the homestead entry of this defendant; that trial was had before the Register and Receiver upon the contest brought by the plaintiff, the plaintiff and this defendant appearing thereto; the Register and Receiver rendered their decision in favor of this defendant; within the time allowed for appeal the plaintiff, George Schlosser, appealed from said decision; that upon said appeal the case is now pending before the Commissioner of the General Land Office at Washington, D. C.; that no decision thereon has been had. Certified copy of docket entry of said case is hereto attached marked Exhibit "G" and made a part hereof. Wherefore, the defendant prays that the court will require plaintiff to reply to the allegation of this defendant's answer as set forth in Exhibits "A" to "G," inclusive, and that upon the admission of the plaintiff of the truth of said facts or upon the proof of the allegations contained in said exhibits the court will dismiss the plaintiff's bill for want of jurisdiction and that the plaintiff's petition may be dismissed with costs against the plaintiff and for general relief.

On the 4th day of March, 1900, defendants in error, W. L. Hemphill, and Palo Alto County, filed in the District Court of said Palo Alto County the following joint

ANSWER.

(As to lots 2 and 3, and the Government survey mentioned in plaintiff's petition; as to survey made under authority of the decision of the Secretary of the Interior of March 8, 1898, mentioned in the answer of Richard T. Ryan, the answer of

these defendants are identical with that of Richard T. Ryan.) For further answer these defendants state that lots 11, 14 and 15 section 30, T. 97, R. 34, as shown by the Government survey made from the 2nd to the 20th day of April, inclusive, for the year 1898, is swamp and overflowed lands and was included in the grant of September 28, 1850, to the State of Iowa, made by the government of the United States wherein all the swamp and overflowed land in the State of Iowa was granted to the State of Iowa, and said lots were included in the grant of the legislature of the State of Iowa wherein all swamp and overflowed land in Palo Atlo county was granted to Palo Alto county. And that the defendant, W. L. Hemphill, has purchased from said county said lots, and has paid a part of the purchase price therefore; that the legal title to said lots remain in the United States as patent has not yet issued; that the equitable title is in Palo Alto county subject to a contract of sale of defendant, Hemphill; that on the 30th day of August, 1898, said county by its duly authorized swamp land agent selected said lots as swamp and overflowed land and filed such selection in the United States land office at Des Moines, Iowa; that on the same day the plaintiff herein made application to enter said lot 14 as an adjoining farm homestead, his said application being filed in the United States land office at Des Moines, Iowa; that by order of the Register and Receiver of said land office a trial was had before said officers, of which the plaintiff herein had notice; that said officers rendered their joint decision, holding each of said lots to be swamp and overflowed and approving the same to the State of Iowa and Palo Alto county; that said decision was forwarded to the Commissioner of the General Land Office on appeal of the plaintiff herein; that the Commisioner of the General Land Office affirmed the decision of the Register and Receiver; that thereafter the Secretary of the Interior affirmed the decision of the Commissioner and has approved each of said lots for

patent; that there only remains the ministerial act of preparing and executing the patent from the Government of the United States to the State of Iowa and from the State of Iowa to Palo Alto county to establish the legal title in said county. These defendants deny that this court has jurisdiction over the subject matter of this suit. Wherefore, the defendants pray that the petition of the plaintiff be dismissed and judgment rendered against the plaintiff for costs and for general relief.

On the 11th day of April, 1900, plaintiffs in error filed in the District Court of Palo Atlo County the folowing

REPLY.

Plaintiff for reply to the answer of Richard T. Ryan denies every allegation not otherwise admitted or plead to. Plaintiff denies that defendant went into possession of a portion of the land on or about August 1898, and has resided thereon since said time; he denies that land upon which defendant resides is a part of the land claimed in this action by the plaintiff; he admits that he made application to enter a portion of this land as stated; that said application was made under advise of counsel that it would not waive or bar his title obtained by him thereon if he obtained the same by virtue of the patent issued to said Anthony through whom he claims title, and that it would be cheaper to obtain the claimed outstanding title by entry. That all of the proceedings with reference to the re-survey of the land and opening the same for homestead was without authority or jurisdiction for the reason that prior theretofore the United States had caused section 30 to be surveyed and platted and thereafter sold and conveyed said land according to the official plat to John A. Anthony; that by said patent the United States parted with all its title to the land in controversy herein.

On the 11th day of April, 1900, the defendant in error, W. L. Hemphill, filed in the District Court of Palo Alto County the following

AMENDMENT TO HIS ANSWER.

That prior to the 29th day of April, 1900, the plaintiff had fenced and was in possession of the land described in the petition outside of the meander line, and had thereon a fence; that the defendants, Hemphill and Ryan, were claiming said land and the possession and ownership thereof as set out in their answers; that the plaintiff and this defendant had entered into an oral agreement whereby for the consideration of $25 then paid by the defendant to the plaintiff the plaintiff sold to this defendant said fences and relinquished to the defendant said land and all claims and demands of the plaintiff thereto, and thereupon the plaintiff executed to this defendant a written contract and receipt in words and figures as follows, to-wit:

"Ruthven, Iowa, 4-29, 1899.

"I hereby sell all my interest in the following fences on the "section line between sections 29 and 30 of two wires on what "borders up to Crookshank's. One on or near the county line of "about 80 rods and one starting on or near the half section line "on the west side of section 30, and running in an irregular "line to southwest corner of lot 4, section 30, of two wires. And "a three wire fence running from southwest corner of lot 4 to "half section corner on east line of section 30 to the said W. L. "Hemphill, all being in township 97-34 and 97-35, for the sum "of $25.00 in hand paid by the said Hemphill for possession of "land and fences.

"GEORGE SCHLOSSER."

That thereafter the plaintiff and this defendant entered into further oral argeement that the parties should have Leroy Grout,

county surveyor of Palo Alto county, run a boundary line between the land of the plaintiff and of the defendants in accordance with the meander line of the original Government survey, and that said line should be the boundary line between the land of the plaintiff and these defendants, and that division fence should be built upon the same; plaintiff should build half and the defendants half of said fence; that thereafter the said parties did procure said Grout to run said line, and thereafter built a portion of his half of said fence, and the parties thereafter occupied their respective premises and by reason of said agreement the meander line and the fence thereon has become and is the boundary and division line between the lands of the parties hereto.

On the 11th day of April, 1900, the defendant in error Richard Ryan filed in the District Court of Palo Alto county, Iowa, the following

AMENDMENT TO HIS ANSWER.

Richard Ryan amending his answer makes a part hereof all the allegations of Paragraph 12 of the amendment to the answer of W. L. Hemphill, and further shows that the land of this defendant, Richard Ryan, lies between the land of the defendant, Hemphill, in said amendment referred to. Further answering the defendant said that under and by virtue of the laws of the United States the defendants herein are the owners of the land in controversy herein; that defendants claim the ownership and possession of said lands by virtue of the acts of Congress, that prior to the several acts of the Land Department of the United States in the answer of the defendants referred to, said lands were public lands of the United States; that the State of Iowa and the courts and laws of Iowa had no authority or jurisdiction thereover; that only the court of the United States

and Land Department thereof have any jurisdiction of this controversy.

On the 11th day of April, 1900, plaintiff in error by way of reply to the answer and amendment to Palo Alto county and W. L. Hemphill filed in the District Court of Palo Alto county the following

REPLY.

Division 1. Plaintiff denies each and every allegation in said answer and amendment except admitted or plead to. With the explanation in this reply hereinafter stated, plaintiff admits that on the 30th day of August, 1898, he filed application in the United States land office at Des Moines, Iowa, to enter lot 14; that a trial was ordered by the Register and Receiver and had before said officers to determine the swampy or un-swampy character of said lot; that at said trial the plaintiff appeared with counsel; that the Register and Receiver rendered their joint decision, holding said lot as swamp land and approved the application of the State of Iowa and Palo Alto County; that the plaintiff appealed; that the Commissioner of the General Land Office affirmed the decision of the Register and Receiver; that the Secretary of the Interior approved the decision of the Commissioner, and approved said lot for patent; that there only remains the ministerial act of preparing and executing a patent from the United States to the State of Iowa and from the State of Iowa to Palo Alto county, conveying the legal title to the county. Plaintiff admits that on the 29th day of April, 1899, he entered into an oral contract with W. L. Hemphill for the sale of a fence; that said fence was not located on the south half of section 30. Plaintiff especially denies that there was any contract with reference to the possession of any part of the land in controversy; that he signed or executed the receipt set out in said

answer, but avers that he did sign a receipt for $25 for the purchase price of the fence; that if said paper set out bears the true signature of the plaintiff the last six words, to-wit: (for possession of land and fence) was inserted therein after the same had been signed and without plaintiff's knowledge and consent; that the instrument as it now appears is not the instrument signed by plaintiff. Plaintiff denies each and every allegation except the oral agreement of the boundary lines except he admits he had a conversation with said defendant with reference to ascertaining the lines of the Barber survey, and did agree if the defendant would employ Grout to run said lines, and if it was determined plaintiff's line did not exist further than the lines so surveyed by Barber he would pay half the expenses of said survey.

Division 2. As to the acts and proceedings in the Land Department of the United States plaintiff replies the same as in his reply to the answer of Richard Ryan.

On the 15th day of May, 1900, the defendants in error, W. L. Hemphill and Palo Alto County, filed in the district court of Palo Alto County the following

SUPPLEMENTAL ANSWER.

Pursuant to the re-survey of the lands described in the petition and in pursuance of the laws of Congress of the United States a patent for lots 11-14 and 15, in section 30, township 97, range 34, was on the 18th day of April, 1900, duly executed and issued by the United States of America to the State of Iowa under and by virtue of an act of Congress of September 28, 1850, granting swamp and overflowed lands to the State of Iowa, and the State of Iowa on the —— day of April, 1900, did execute and issue to the County of Palo Alto a patent for said lots; that prior to the commencement of this action and ever

since the defendant, Hemphill, has been in possession of said premises.

On the 22nd day of May, 1900, plaintiff in error filed in the district court of Palo Alto County the following

REPLY.

That the title and interest which the defendants claim to the alleged lots is barred in that the plaintiff and those under whom he calims title have been in open, notorious and adverse possession of said land more than ten years prior to the commencement of this action and ten years before defendants asserted any claim of title thereto, and that said possession has been continuous; that the defendants made no effort to assert title thereto and are barred by the statute of limitation.

On the 11th day of April, 1900, the case came on for trial before the district court of Palo Alto County and the following proceedings were had:

PLAINTIFF'S EVIDENCE.

EXHIBIT "A."

Being a certified copy of a patent issued by the United States to John A. Anthony for lots 2 and 3, section 30, T. 97, R. 30, containing 99.80 acres, dated October 10, 1897.

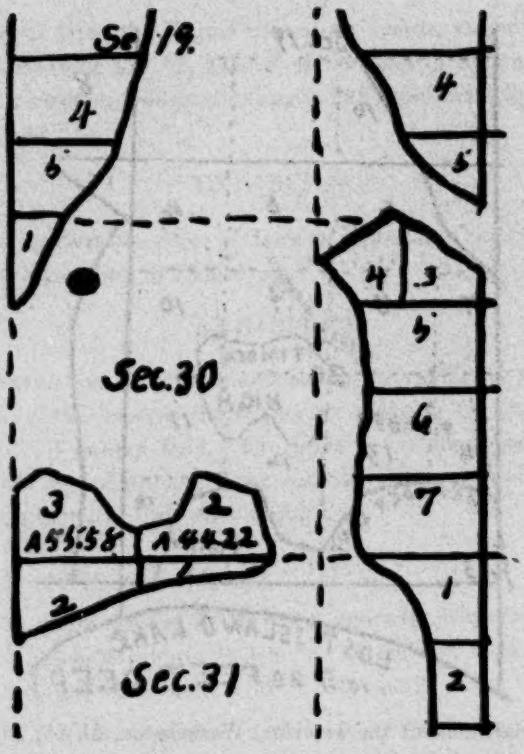
EXHIBITS "B", "C" and "D".

Being mense conveyances from John A. Anthony to Frank L. Given, from Frank L. Given to George Schlosser of the lands described in Exhibit "A".

EXHIBIT "E".

A plat of original Government survey in Sec. 19-20-29 and 30.

EXHIBIT "E"



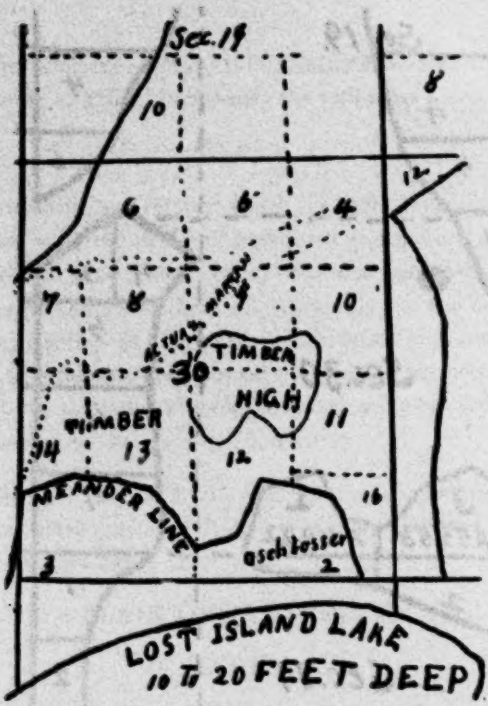
Plaintiff also offered evidence of a number of witnesses tending to show the condition of the land in controversy as to whether it was a lake of water or swamp or overflowed land.

DEFENDANTS' EVIDENCE.

EXHIBIT 2.

A plat of additional surveys in section 19, 20, 29 and 30, T. 97, N. R. 34 and 35. Authorized by the Interior Department March 8, 1898.

EXHIBIT 2.



"Department of the Interior, Washington, D. C., July 20, "1898. The above map of additional survey in T. 97, N. R. 34 "and 35, W. 5. P. M. Iowa is strictly comformable to all the "filed notes of the survey thereof on file in this office which have "been examined and approved.

"BINGER HERMAN,

"Commissioner and ex-officio Surveyor General for Iowa."

EXHIBIT 23.

Being certified copy of records of the register of homestead entries of the United States Land Office at Des Moines, Iowa, showing homestead entry of Richard T. Ryan for lots 12 and 13, section 30, T. 97, N. R. 34.

EXHIBIT 44.

Patent from the United States of America to the State of Iowa conveying lots 11, 14, 15, of the land in controversy together with other lands amounting to 298 acres under the swamp land grant.

EXHIBIT 45.

Patent from the State of Iowa to Palo Alto County conveying land described in Exhibit 44.

EXHIBIT 39.

Written contract of employment by Palo Alto County of E. B. Evans to represent the county in applying for survey and selection of swamp land. Providing for a compensation for such services of an undivided one-half interest of all swamp lands patented to Palo Alto County.

EXHIBIT 40.

Quit claim deed of E. B. Evans and wife conveying an undivided one-half interest in lots 11, 14 and 15, section 30, T. 97, R. 34 and other lands to W. L. Hemphill.

The defendants offered in evidence the testimony of various witnesses and exhibits as to the character of the land in controversy whether it was lake or swamp land.

On the 10th day of August, 1900, the district court of Palo Alto County rendered its decree, decreeing the title in fee simple to all the land in controversy to be in the plaintiff.

Within the time provided by the laws of the State of Iowa the defendants appealed to the supreme court of the State of Iowa, the case was fully argued before the supreme court of the State of Iowa, and on the 3d day of June 1902, the supreme

court of Iowa reversed the district court of Palo Alto County and rendered the following decision:

"George Schlosser

vs.

"W. L. Hemphill, Richard Ryan, et al., Appellants.

"Appeal from Palo Alto district court.

"This is an action in equity to quiet title to a tract of some "two hundred and ninety acres of land in the south half of sec- "tion 30, township 97, range 34, in Palo Alto County. Plaintiff "is the admitted owner of lots 2 and 3 forming a part of said "tract and containing about ninety-nine acres. According to "the original Government survey made in 1857, this land was "adjacent to a lake which was meandered, and the meander lines "were run along the north side of the said two lots. The re- "mainder of the land claimed lies between this meander line "and the alleged shore of the lake, and is the subject of the con- "troversy.

"The half section in question, that is, such part of it as lies "beyond the original meander line, was re-surveyed by the Gov- "ernment in the year 1898 and platted into 5 lots, of which lots "11, 14 and 15 are claimed by defendant Hemphill, and lots "12 and 13 by defendant Ryan. These claims are founded upon "conveyances from Palo Alto County, under a patent issued to "the State, under the swamp land grant of 1850 and which is "based upon the re-survey of 1898. Schlosser insists that the "meander line is not his boundary, it not marking the edge of "the lake, but that he is entitled to claim up to the east and west "half section line of said section."

There was a decree for plaintiff and defendants appeal.

E. B. Evans and Morling & Davidson, *for Appellants.*

Buck & Kirkpatrick and Carr & Parker, *for Appellee.*

Waterman, *Judge.*

Lots 2 and 3 which plaintiff admittedly owns, are bounded on the south section line and they extend almost across said section from east to west. Plaintiff's claim was once before presented to this court in an action of a similar nature to this, but against a different defendant. See *Schlosser vs. Cruickshank, 96 Iowa 414.* Plaintiff was then successful. But that was before the re-survey and issuance of a patent and the making of conveyance by the county. And more than this, in the other case Schlosser claimed title only to the actual margin of the alleged lake, while here he claims to the half section line, which was first run through this section by the re-survey of 1898.

It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence then before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake.

When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser vs. Cruickshank, supra, and authorities therein cited.

In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent re-survey by the Government in the absence of fraud or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto.

Mitchell & Smale, 140 U. S., 819.

But where there is no adjacent body of water proper to be meandered the rule we have mentioned will not apply. In such

a case the meander line will be a boundary line, and one who purchases from the Government according thereto cannot claim title beyond it.

Grant vs. Hemphill, 92 Iowa, 218.

French-Glen L. S. Co. vs. Springer, 22 S. C. Rep. 563.

We have then to determine whether there was a body of water in section 30, proper to be meandered. As to what bodies of water should be meandered see *Lester's Land Laws (ed. 1860) 714.* We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the conclusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there. The lake spoken of in *Schlosser vs. Cruickshank,* as being about two miles wide, three miles long and 10 to 18 feet deep and adjacent to his land is evidently Lost Island lake, which lies south of section 30 and nowhere touches it. The meandered lake which gives rise to this controversy is called Mud lake and as must be manifest from what we have said, lies north of plaintiff's land. How far, if at all, this mistake affected the conclusion in the Cruickshank case, we are not able to say, but that it was an error is clear from the fact that neither witnesses or counsel for plaintiff claim Mud lake to answer at all to the description so given. The confusion seems to have arisen from the fact that the Cruickshank case was submitted in connection with another case involving similar questions—*Caldwell vs. Jackson*—but which related to land bordering upon Lost Island lake, and the arguments were made in the latter case.

The case of *Grand & Hemphill* to which we have alluded

above involved Mud lake, as alleged on section 19, which of course adjoins section 30, on the north and the evidence in that case, in which it was found no lake existed adjacent to the land of the plaintiff in that action, seems to have been quite similar to what is relied on here in support of Schlosser's case. We are confirmed in our conclusion by plaintiff's present claim. He does not seek to extend his north line to the shore of a lake but to the half section line, which did not appear on the original plat for with the exception of a very small tract in the northwest corner of the section, the lake was shown to cover that whole sub-division outside of plaintiff's two lots. The half section line certainly does not mark the shore line of any body of water at present or hertofore existing. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was, is far south of the half section line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

Rood vs .Wallace, 109 Iowa 61.
Noyes vs. Board of Supervisors, etc. 104 id. 174.

The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the greater part of such body of water was but temporary in character, is sufficient to convince us that no meander line should ever have been run here. Plaintiff's present claim and the facts and arguments in its support tend to clear the half section in question of any lake and indeed to remove such permanent body of water wholly from the map. We are further inclined to believe that when the meander line deviates so far from the true

shore as it does in this case from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel the error would be so gross as to warrant a re-survey.

Cragin vs. Powell, 128 U. S. 691.
Mich. L. L. Co. vs. Rust, 168 id. 589.
Wiles & Cedar Point Club, 175 id. 300.

While it is true that the significant question before us is the condition that existed when the original survey was made, and that attempt to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud lake is shown on the plat to be.

2. Plaintiff rests his claim of title also upon adverse possession. It is said he and his grantors have been in possession of the disputed tract claiming title thereto for much more than ten years prior to the beginning of this action—that the swamp land act of 1850 was a grant *in praesenti* and that the statute of limitations will run against the county. The grant of swamp lands which had been surveyed and platted was *in praesenti* and it has been said passed title to the State, and from the State such title passed to the counties by the act of the General Assembly.

Smith vs. Miller, 105 Iowa, 588.
Bailey vs. Callanan, 87 id. 107.
Am, Em. Co. vs. Fuller, 83 id. 599.

But it was an inchoate title only that passed under the act to the State. The legal title remained in the United States

until a patent was issued. *Odgen vs. Buckley*, decided at present term: *Rogers L. Works vs. Am. Em. Co., 164 U. S. 559; Mich. L. & L. Co. vs. Rust, supra.* Furthermore the swamp land act did not operate to convey any interest in lands unsurveyed at the date of its passage. A survey into legal subdivision is a necessary pre-requisite to the passing of title from the Government. *Boynton vs. Miller, 22 Iowa 579.* So long as title remained in the United States the statute of limitations would not run.

Durham vs. Hussman, 88 Iowa 29.
1 Am. & E. Enc. of Law 875.

and cases there collected. This land was not surveyed until the year 1898. Before it was laid out into legal subdivisions, neither State or County could make a selection or assert any title to it. See further on this point:

Iowa R. R. Land Co. vs. Adkins, 48 Iowa, 351;
Chicago, R. I. & P. R. R. Co. vs. Alfree, 64 id. 500.

In our opinion the plaintiff has no right to any other than the land patented to his grantor, and the decree of the trial court must therefore be

REVERSED.

Thereafter and within the time provided by law the plaintiff in error, George Schlosser, sued out his writ of error in the supreme court of the United States and in support of his appeal and his grounds therefore filed the following

ASSIGNMENT OF ERRORS.

1. Under the laws, statutes and decisions of the United States, the meander line is not the boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the

purpose of ascertaining the amount of land for which the Government charged upon the sale thereof.

2. The court erred in holding and deciding in its said opinion and decision that plaintiff in error was not the owner of the real estate involved in said controversy.

3. The court erred in construing the laws of the United States not to convey title under the patents issued by plaintiff's grantor to lots 2 and 3 of section 30, township No. 97, range No. 34, west 5th P. M. Iowa.

4. The court erred in holding that under the swamp land act of September 28th, 1850 (9 Stat. at L. 520, Rev. Statutes. Sec. 2479 et seq.), and patents of the United States dated October 10th, 1874, that plaintiff's mesne grantor did not acquire title to the land in controversy.

5. The court erred in holding that the swamp land act of September 28th, 1850 (9 Stat, at L. 520 Rev. Statutes Sec. 2479 et seq.), did not convey title prior to the survey of the land in question into legal subdivisions.

6. The court erred in refusing to follow the decisions of the supreme court of the United States in construing the statutes of the United States as applied to meander lines.

7. The court erred in refusing to follow the decisions of the supreme court of the United States in construing the statutes of the United States as applied to lands included in patents issued by the United States.

8. The court erred in holding that a new survey of the lands in controversy could affect plaintiff's title acquire by patent from the United States dated October 10th, 1874.

9. The court erred in holding that there was any authority of law under the statutes and acts of congress authorizing a resurvey or further survey of land under the facts disclosed in this case.

10. Under the statutes and various acts of Congress in relation to surveys and sales of the public domain, the original survey as disclosed in this case, and the sale by the Land Department of the United States, and the patents issued by the United States in pursuance of such sale, conveyed title to plaintiff's grantor, and plaintiff, by mesne conveyance from such grantor, took title to the land in controversy, and in said judgment and decision the supreme court of Iowa erred in refusing to establish and quiet the title of plaintiff in error thereunder.

And thereupon, upon the foregoing assignment of errors, the said George Schlosser respectfully asks and prays that upon the writ of error granted upon his petition and for the review of the errors herein assigned that the said judgment and decision of the supreme court of Iowa may be reversed, and the action, decision and judgment of the said supreme court of Iowa may be set aside; and said George Schlosser will ever pray.

GEORGE E. CLARKE,

Attorney for George Schlosser, Plaintiff in error.

CHAS. A. CLARK, of Counsel.

The above and foregoing we think sufficiently states the case for the purposes of this motion to dismiss.

E. B. EVANS,

Counsel for Defendants in error.

BRIEF AND ARGUMENT UPON MOTION TO DISMISS.

The points relied upon by the plaintiff in error for a reversal of the decision of the supreme court of the state of Iowa are ten in number and are substantially set forth in the following proposition:

First: That under the laws, statutes and decisions of the United States a meander line is not the boundary line of lots

sold by the United States, but is run for the purpose of conforming to the irregularities and sinusoities of creeks and lakes for the purpose of ascertaining the amount of land for which the government charged upon the sale thereof.

The above point, seems to us, presents all the question involved in the ten assignments of error. Upon discussing this point we call attention to the fact that the fourth and fifth assignments of error made by the plaintiff in error is not based upon the record anl leads to a misapprehension of the record for the reason that the record discloses that the patent from the United States to Anthony, the plaintiff's grantor, was made by virtue of a homestead entry of said Anthony and was not issued and the land was not granted under the swamp land act of September 28th, 1850. Lots two and three, the land embraced in said patent to Anthony, was not swamp and overflowed land and never was claimed as such so far as the records in this case disclose.

The question of the plaintiff's right to the land in controversy depends upon the patent issued by the United States in 1874 to Anthony embracing lots 2 and 3 of Section 30, T. 97, R. 34, which patent discloses that there were 99.80 acres sold or disposed of by the Government to Anthony. If plaintiff succeeds in obtaining title to the land in controversy, it must be by virtue of the construction of this patent and the patent must be made to include the remainder of the land embraced in the south one-half of Section 30 and as we understand plaintiff's theory the patent should be so construed in order to protect the plaintiff as a riparian owner. In other words, that by virtue of said patent to the plaintiff's grantor he is entitled to all the lands between the meander line of his said lots and the half section line of section 30. This raises a question of fact as to whether there is or was a lake of water upon the south one-half of section 30 and the further legal question as to whether the

plaintiff is a riparian owner. There are the two crucial points involved in this case one a question of fact and the other a question of the laws of the State of Iowa pertaining to riparian ownership.

There is no question in this case involving in the slightest degree the acts of Congress or the laws of the United States under which Anthony obtained his title to lots 2 and 3. The only question being the location of the land so patented. In this connection we adopt the language of a decision of this court as it so aply expresses the crucial point involved in the plaintiff's claim:

"This court has repeatedly held that it does not warrant the "review of an adjudication upon a mere question of boundary. "The fact that the land to which the boundary relates is held "by a title derived from an act of congress does not change the "result. If the title be admitted, as recognized by the act, its "location upon the boundary is a subject wholly within the "cognizance of the state tribunals, and it is not within the power "of this court to review their action.

"The supreme court of Louisiana construed correctly the sev- "eral acts of Congress. The errors, if any were committed, was "in locating it upon the land, and in fixing the boundary. No "act of Congress was drawn in question."

Lanfear vs. Hinley 4 Wal. 209.

If a federal question is presented in the record of this case then every cause involving the title to real property where the litigants derive title under and by virtue of a law of the United States and wherein their right to the land was denied by a state supreme court could be reviewed by the supreme court of the United States regardless of the questions decided by the supreme court. As we understand it, the rule is that it is only where the statute under which the party received his title from the govern-

ment of the United States must be construed and passed upon that the federal question is raised, not in a cause such as the one at bar where no question is made or no construction is necessary of the act under which the plaintiff in error obtained his title, the only question being the extent of the boundaries of that title. We again quote from a decision of this court: "It "is a mere question of boundaries between two neighbors * * * "It is a question of fact depending on monuments to be found "on the ground documents in the land office or the opinion of "expert surveyors; * * * if the accident of the controversy that "both parties claimed title under the United States should be "considered as sufficient to bring it within our jurisdiction then "every controversy involving the title of such lands, whether it "involves inheritance, partition, devise or sale may with equal "propriety be the subject of examination by this court."

Moreland vs. Page, 20 Howard 523.

The jurisdiction of this court to consider this case involves the following questions:

First: Is there a federal question involved and has the decision of the federal question if any is involved, been against the validity of a treaty, or statute or an authority exercised under the United States; has the decision been in favor of the validity of a statute of, or an authority exercised under the laws of the state of Iowa which statute or authority is repugnant to the constitution, treaties or laws of the United States, or has the decision been against any title, right, privilege, or immunity specially set up or claimed by plaintiff in error under the constitution or any treaty or statute of, or commission held or authority exercised under the United States? If the answer to these questions is in the negative such answer ends this case.

Second: Could the case have been decided by the supreme court of Iowa without regard to the federal question? If the

answer to this question is in the affirmative it likewise ends this case.

"Whenever the power to enact a statute, as it is by its terms, "or is made to read by construction, is fairly open to denial "and denied the validity of such statute is drawn in question "but not otherwise."

Baltimore & Potomac R. R. Co., 130 U. S. 224.

"The validity of the authority must have been drawn in ques- "tion directly and not incidentally. The validity of a statute is "not drawn in question every time rights claimed under such "statute are controverted nor is the validity of an authority "every time an act done by such authority is disputed. The "validity of a statute or the validity of an authority is drawn "in question when the existence or constitutionality or legality "of such statute or authority is denied and the denial forms "the subject of inquiry."

United States vs. Lynch, 137 U. S. 285.

See also *Cook County vs. Calumet & Chicago Land Company, 138 U. S. 653.*

The question of the validity of the statute under which the plaintiff in error claims his title is not in question in this case. It is only a question of fact as to the boundaries of the land the plaintiff in error secured under that statute, that question of fact could be and was determined by the supreme court of Iowa without regard to the federal question. We now call attention to the decision of this court in the case of *Sweringen vs. City of St. Louis, 185 U. S. 45,* which case is very similar as to facts and legal questions as is the case at bar. In that case the plaintiff in error, being the plaintiff below, obtained a judgment in the state circuit court of the city of St. Louis for the recovery of certain lands. Upon appeal the supreme court of the state of Missouri reversed the judgment of the circuit court

and the plaintiff in error brought the case to this court by writ of error. The property was bounded on the east by the Mississippi river, the question involved in the case was whether plaintiff was entitled to the alluvium caused by the recision of the Mississippi river by virtue of a patent from the United States. The trial court held she was; the supreme court held she was not. In the patent of the United States conveying the land in controversy to plaintiff's grantor, the boundary lines of the land granted was described. It appeared in evidence that at the time patent was executed that the east boundary of the land described in the patent was several hundred feet west of the waters of the river, that at the time of the trial such boundary was 1500 feet west of the waters of the river. The plaintiff in error brought her suit of ejectment against the city of St. Louis; the city was using the land brought into existence by the recision of the waters of the Mississippi river as a public wharf. A motion was made in this court to dismiss the writ of error for lack of jurisdiction based upon the averment that there was no federal question involved. In passing upon this motion the supreme court said:

"In our judgment there is no federal question arising by "reason of plaintiff's claim under the patent put in evidence by "her as the source of her title to the land in question. With "reference to the first clause of Section 709 of the revised "statutes, it appears plainly that the validity of the patent has "never been questioned. Nor has the validity of any treaty or "statute of, or authority exercised under the United States, "been drawn in question. It is a pure question of the construc- "tion of the language used in the patent. Whether the land "granted therein reached the waters of the Mississippi river on "the east, or whether, according to the courses and distances con- "tained in the patent, the eastern limit of the land conveyed was "some hundreds of feet west of the river. It was really a ques-

"tion of facts as to how far east the measurements of the courses "and distances carried the boundary. There was no contention "made as to the authority of the Government to convey the land "to the bank of the river where the water was actually flowing, "if it choose so to do."

Sweringen vs. St. Louis, 145 U. S. 45.

In the case at bar we have the plaintiff in error claiming title to the land in controversy under and by virtue of a patent issued under the laws of the United States pertaining to the disposal of public lands known as the homestead law. The defendant in error, Richard T. Ryan, claiming a right to secure a patent from the United States under the same law and by virtue of his settlement upon the land and the allowance of his homestead entry. The defendants in error, Palo Alto County and W. L. Hemphill, claiming a portion of the land in controversy under and by virtue of the swamp land grant of September 28, 1850, and patents issued by the United States under that grant. It is not denied but what each and every law just mentioned was valid. We are not called upon to consider for one moment the validity of either statute. We are not called upon to consider its existence or its constitutionality or to determine its import or in any manner to interpret either of these laws. The one question involved in this case is the boundary line between the land patented to Anthony the grantor of the plaintiff in error and the land patented to the state of Iowa under the swamp land grant claimed by the defendants in error Palo Alto County and W. L. Hemphill, and the land embraced in the defendant Ryan's homestead entry.

As to the 8th and 9th assignment of error made by the plaintiff in error, we suggest that it is not competent to attack the decision of the Secretary of the Interior and the acts of his subordinate officers in relation to the survey of the public

domain in a collateral proceeding. The Secretary of the Interior is vested with wide discretionary power in reference to the determination of the character of land and of surveys of the public land. When he has decided, his decision is binding upon the courts, at least to the extent that they cannot be set aside and held for naught in a collateral attack.

Could the case have been decided by the supreme court of Iowa without regard to a federal question? If so, this court is without jurisdiction. The answer to this question is found in the decision of the supreme court. We have not set out for the purpose of this motion the record of the vast array of testimony produced in the trial of this case and considered by the supreme court on the question of fact as to whether there was a body of water upon which to base the meander line of plaintiff's lots; if there was in fact no body of water north of plaintiff's lots which could properly be meandered, then there is absolutely nothing upon which to base plaintiff in error's contention of riparian ownership. Days were spent in the trial court taking testimony of witnesses as to the so-called body of water designated as Mud lake. Expert surveyors were employed on both sides of the controversy. Scores of levels were taken on the land. Lines were run, maps introduced, old settlers were brought in to testify as to the volume of water upon said land, and after considering the entire case on this question of fact and announcing the rule in Iowa as to riparian ownership, the supreme court of Iowa said:

"We have then to determine whether there was a body of "water in section 30 proper to be meandered. As to what bodies "of water should be meandered see *Lester's Land Laws (Edition "1860) 714.* We do not intend setting out the testimony on this "point. It is quite voluminous and very conflicting. From a "careful reading of it we reach the conclusion there was no such "body of water. That there was swampy and low land in section

"30 north of plaintiff's lots admits of no question and in wet "seasons doubtless a large part of it was covered at times with "water, but we are equally clear that no permanent body of "water of any considerable extent existed there."

Thus we have a question of fact as to the character of land decided by the supreme court of Iowa which is absolutely conclusive of the entire matter. Even had we attacked the law under which the plaintiff claimed his title, and it was necessary to construe that law, yet if the supreme court of Iowa could have determined the matter without regard to that question having been raised, then our inquiry is ended and such a determination becomes a finality; but we have no such question. The law under which plaintiff claims his title is not to be construed; it is not attacked; his rights under the law are not denied; and so for both reasons discussed herein we submit the plaintiff has no standing in this court.

In conclusion we submit that the questions involved in this case and decided by the Supreme Court of Iowa against this plaintiff were: First, a question of fact in which it was found that there was no body of water north of plaintiff's lots upon which to base the meander line as run by the original surveyor. Second, that the distance between the meander lines of plaintiff's lot and the water line of the alleged lake was so great and the land lying between said water line and meander line was so much that the plaintiff could not, under the laws of Iowa, be possibly construed a riparian owner. Third, that the statutes of limitations of Iowa will not run against the grantees of the government of the United States under the swamp land grant before the land has been surveyed or selected. Neither of these three questions involve a federal question or a question which confers jurisdiction upon this court.

E. B. Evans,
Attorney for Defendants.

H. C. Evans and Evans & Evans of Counsel.